

The Age of Constitutional Barbarism

Kriszta Kovács

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In January 2011, we organized a mini conference about the Hungarian constitutional transformation at Humboldt University. We described the chain of events, from the landslide victory of the then-opposition party, Fidesz, to a series of drastic constitutional revisions. In our presentations, we called the transformation a constitutional crisis and we argued that the constitutional revisions did not meet the democratic constitutional standards.

Max Steinbeis, the founding father of the young and ambitious *Verfassungsblog* was present and on the next day, he reported on our scholarly discussion in a post titled [Verfassungs-Barbarei in Budapest](#) (Constitutional Barbarism in Budapest). Some of our peers at home seconded the report, whereas many others held us responsible for the critical account and the blog post title. They insisted that there was nothing in the process and the outcome of the constitutional transformation that contradicted the principles of constitutionalism, democracy and the rule of law.

The scholarly support for and contribution to the Hungarian constitutional transformation coincided with new trends that have been dominating mainstream constitutional scholarship. A growing number of academics argue normatively, following either Jeremy Waldron or Richard Bellamy, that constitutional review is not an essential part of democracy or even that it is undemocratic. They suggest that parliament and, tentatively, some direct participatory forms of democracy provide a superior kind of democratic deliberation than decision-making by unelected judges. Justificatory arguments are offered for weak constitutional review in which parliament can disregard or override a court's determination of what fundamental rights require. What's more, since the "[realist turn](#)" in constitutional law skeptical approaches to normative theories have flourished. Pure empirical and strategical analyses have also been on the rise. Powerful arguments thus insist that democratic constitutionalism means majoritarian rule and does not include meaningful judicial supervision of both the executive and the legislative branches.

All these contestations haven't proven useful for the new authoritarians in Hungary and beyond who welcome these arguments as a contribution to transforming constitutional democracy. The new "illiberal democracy" (Orbán), "sovereign democracy" (Putin) or "advanced democracy" (Erdo#an) appears to be a majoritarian one backed by the electorate, and the system apparently implements a first-past-the-post voting method or a hybrid voting system, where majoritarian elements are dominant. Apologists for that pretense of democracy tend to present the new system as a constitutional structure in which "juristocracy" is replaced with "parliamentary sovereignty," and "political constitutionalism" is introduced instead of "legal constitutionalism".

What exactly is the new system challenging liberal democracy? Is the emerging system an alternative version of constitutionalism or an autocratic deviation from

constitutional democracy? One of the crucial difficulties constitutional scholars face when answering these questions is that there are considerable overlaps between the constitutional mechanisms of advanced democracies and authoritarian regimes. Set against imperfect but reasonably well functioning liberal democracies, new authoritarian states present themselves as meeting most of the constitutional requirements and having similar, unavoidable shortcomings in constitutional design and functioning. Degrading the role of parliament, attacking the independent judiciary, manipulating electoral rules so as to favor one party, curtailing civil liberties and freedom of the press, and introducing arbitrary emergency measures by invoking threats posed by financial crisis or terrorism cannot be simply seen as indicators of an authoritarian government because those practices may exist in functioning constitutional democracies too. So many questions remain: What is the real difference between an incomplete or deficient constitutional democracy and a contemporary authoritarian system? What arguments, approaches, methods may be helpful in categorizing certain constitutional developments as manifestations of rising authoritarianism rather than as alternative conceptions of democracy? When a given constitutional choice is regarded as conventional in some states, why is it deemed to be authoritarian in another state?

Consider Mark Tushnet's [argument](#). He gives an explanation of the question mark at the end of his co-edited book *"Constitution Democracy in Crisis?"*. The asserted crisis, his reasoning goes, refers to decline, and decline is in this context a "pejorative" term. To avoid such evaluative terms, he offers descriptive ones. What we are observing is not a decline, he argues, but a "proliferation" of variants and "redefinition" of many components of constitutional democracy. In a similar vein, Armin von Bogdandy, worrying about a potential ["tyranny of EU values"](#), suggests that contemporary Hungarian and Polish constitutional rules should be viewed as instruments of an alternative version of constitutionalism. In his view, domestic law resisting European supranational law is also part of what he calls "the European legal space". Accordingly, he [calls](#) for a constitutional dialogue with the representatives of Hungary and Poland.

But pure empiricism, realism, or relativism do not seem very helpful in answering our questions. Constitutional law is full of value-laden terms; many of them are used almost universally as pejorative terms. A government can "violate" the fundamental rights of its citizens, adopt "unconstitutional" laws, hold "unfair" elections, or introduce "inhuman" treatment of asylum seekers. Apex courts and academics can disapprove of such measures, and the way in which that disapproval is expressed in constitutional law is unavoidably pejorative. And the other way around, if noting a decline in the state of constitutional democracy is pejorative – we agree, it is – then constitutional democracy is not a neutral descriptive category but a term of appreciation. In a normative sense, constitutional democracy today is the only game in town, the only legitimate constitutional system. As a consequence, we agree with Professor Tushnet when he differentiates between the two opposites: "robust" constitutional democracies and Stalinist Russia, because that distinction means that he is not completely against justification and evaluation as inherent parts of constitutional reasoning. And we also agree with Professor von Bogdandy on the importance of constitutional dialogue. But, respectfully, we see a crucial difference

between a dialogue among constitutionalists within the framework of constitutional democracy and a dialogue with delegates of a constitutional simulacrum.

Certainly, when labelling their own regimes, political leaders use subjective expressions. Autocrats do not even aim to describe neutrally the nature of their regime but, being economical with the truth, positively evaluate their own achievements when selecting their vocabulary. A scholar's work is not only a conceptual or descriptive project to understand what democracy, tyranny, and transition from one to another are but also an evaluative project. Academics who characterize one country as a democracy and another as an autocracy or dictatorship are unavoidably evaluating [constitutional practices](#).

Instead of neglecting specific value-laden terms and relativizing others, we should breathe new life into the existing concepts. We need to rediscover the force of normative arguments in order to be able to properly evaluate the last decade's constitutional changes. For this, it is crucial to have thorough accounts of what is to be done in terms of getting closer to a "legitimate and effective path toward a meaningful and sustainable realization of [constitutional ideals](#)". In this process, continuous contestation of fundamental concepts such as constitutionalism, democracy and the rule of law is of utmost importance. Aristotle rightly suggests that the attainment of the best constitution is likely to be impossible for the general run of states; thus, we must have our eyes open not only to what is the absolute best, but also to what is the best all things considered in relation to actual conditions.

An open and robust scholarly debate about the fundamental concepts should even include the most provocative voices. But we second Susanne Baer and Michaela Hailbrunner, who [call](#) for academics to act responsibly, including thinking long and hard about framing and audiences. We have to think carefully about what we criticize or approve and how we do it, with an eye to the broader picture. We are certain that there are many constitutional scholars who would concur with this view. We are lucky to have *Verfassungsblog*, which provides an important, vibrant and openly accessible forum for discussions. In the decades to come, it may serve as a mini laboratory for normative thought experiments on the ways to better understand the autocratic rivals to liberal democracy.

